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MEMORANDUM

TO: St. Croix County Board of Supervisors

FROM: Scott Cox, Corporation Counsel *Scott*

DATE: November 30, 2016

RE: Emerald Sky Dairy Vested Rights

The St. Croix County Board of Supervisors is contemplating the adoption Chapter 22 of the St. Croix County Ordinances entitled "Moratorium on the Establishment or Expansion of Large Livestock Facilities" at its December Board Meeting. Section 2.05 of the proposed Ordinance indicates the moratorium cannot be applied against an entity which has acquired vested rights prior to the adoption of the Ordinance. St. Croix County must then consider Emerald Sky Dairy's pending application in light of the Ordinance, if passed. It is my opinion that Emerald Sky Dairy has already obtained "vested rights" in their application due to the clear language of the Livestock Siting Law.

Emerald Sky Dairy is an existing livestock facility which has already submitted an application to expand its facility. The Board has not yet adopted the Ordinance and therefore the application pre-dates the Ordinance.

The concept of "vested rights" recognizes that, at some point in time, it is inequitable to change the rules and regulations affecting a property owner's ability to use or develop his or her property. The term "vested rights" refers to the point in time when a property owner's right to use or develop his or her property is free from further changes to land use regulations. In this case, the question as to when such rights vest is answered by the siting law at Wis. Stat. §§ 93.90(3)(6)(a) and 93.90(3)(ar).

The state's Livestock Siting Law provides that a political subdivision may disapprove or prohibit a proposed new or expanded livestock facility if the facility violates a requirement that is more stringent than state standards if the political subdivision does all of the following:

- "a. Adopts the requirement by ordinance before the applicant files the application for approval.
- b. Bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety."

Wis. Stat. §§ 93.90(3)(6)(a) and 93.90(3)(ar).

A moratorium, by its very nature, is more stringent than the state standards prescribed under Wis. Stat. § 93.90(2)(a). Since Emerald Sky's application was filed before the possible passage of the County's proposed moratorium, Emerald Sky Dairy has the right for that application to be considered under the rules and

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regulations in place at the time of filing that application. By clear and unambiguous language of the livestock siting law, the legislature has prescribed that any change to a livestock siting ordinance that makes it more restrictive cannot be applied to a permit application submitted prior to the adoption of the more restrictive regulation. Therefore, it is my opinion that Emerald Sky has obtained vested rights in its current application for expansion of a livestock facility.

It has been argued that under common law an entity would have vested rights to obtain a permit or license under an existing Ordinance only if that entity could establish that it submitted an application for a license or permit that was in "strict and complete conformance with" the Ordinance before the change in regulations. *See Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 174-75 (1995). Under that rationale, Emerald Sky Dairy would not obtain any vested rights if it had an incomplete application at the time of the adoption of the moratorium. However, the very specific language of the Livestock Siting Law, in my opinion, overrules any common law concept of vested rights to the contrary.

In conclusion, it is my opinion that the Livestock Siting Law dictates that Emerald Sky Dairy has already obtained "vested rights" in their application.